

AMENDED IN ASSEMBLY APRIL 5, 2010

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

ASSEMBLY BILL

No. 1749

Introduced by Assembly Members Bonnie Lowenthal and Audra Strickland

February 8, 2010

An act to amend Section 8547.2 of, *and to add Section 8547.13 to*, the Government Code, relating to whistleblower protection.

LEGISLATIVE COUNSEL'S DIGEST

AB 1749, as amended, Bonnie Lowenthal. Whistleblower Protection Act: Administrative Office of the Courts.

The California Whistleblower Protection Act prohibits a state employee from using his or her official authority or influence for the purpose of intimidating, threatening, coercing, or commanding any person for the purpose of interfering with his or her right to make a protected disclosure, defined to include the communication of information that may evidence an improper governmental activity. The act requires the State Auditor to investigate and report on improper governmental activities, as specified. The act authorizes an employee or applicant for state employment who files a written complaint alleging reprisal, retaliation, or similar prohibited acts to also file a copy of the written complaint with the State Personnel Board, together with a sworn statement that the complaint is true, under penalty of perjury. The act provides that any person who intentionally engages in acts of reprisal, retaliation, or similar prohibited acts against a state employee or applicant for state employment for having made a protected disclosure, is subject to punishment for a misdemeanor, and shall be liable in an action for civil damages brought by the injured party. The act defines

“employee” as a person appointed by the Governor or employed or holding office in a state agency, as specified.

This bill would include a person employed by the *Supreme Court, a court of appeal, a superior court, or the Administrative Office of the Courts* within the definition of “employee” for the purposes of the California Whistleblower Protection Act, ~~and would provide that specified provisions of the act apply to the Administrative Office of the Courts except as specified.~~ *The bill would authorize an employee or applicant for employment with those judiciary entities who files a written complaint alleging actual or attempted acts of reprisal, retaliation, or similar prohibited acts for having made a protected disclosure, to also file a copy of the written complaint with the State Personnel Board, together with a sworn statement that the written complaint is true, under penalty of perjury. The bill would require the State Personnel Board to investigate any claim filed and make a recommendation regarding the alleged retaliation.*

The bill would provide that any person, other than a judge or justice, who intentionally engages in acts of reprisal, retaliation, or similar prohibited acts against an employee or applicant for employment with those judiciary entities for having made a protected disclosure, is subject to punishment for a misdemeanor, and shall be liable in an action for civil damages brought by the injured party. The bill also would prohibit an employee of those judiciary entities from using his or her official authority or influence in violation of these provisions, and would make that employee liable in an action for civil damages brought by the injured party. By expanding the scope of the crimes of perjury and the intentional reprisal, retaliation, or similar prohibited acts against a state employee, as described above, to include an employee of the Administrative Office of the Courts, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 *SECTION 1. Section 8547.2 of the Government Code is*
2 *amended to read:*

3 8547.2. For the purposes of this article, the following terms
4 have the following meanings:

5 (a) “Employee” means ~~any~~ *an* individual appointed by the
6 Governor, or employed or holding office in a state agency as
7 defined by Section 11000, including, for purposes of Sections
8 8547.3 to 8547.7, inclusive, ~~any~~ *an* employee of the California
9 State University, or an individual appointed by the Legislature to
10 a state board or commission and who is not a Member or employee
11 of the Legislature. *In addition, “employee” means a person*
12 *employed by the Supreme Court, a court of appeal, a superior*
13 *court, or the Administrative Office of the Courts for the purposes*
14 *of Sections 8547.3 to 8547.7, inclusive, and Section 8547.13, except*
15 *for those provisions of Section 8547.4 concerning notice of adverse*
16 *action and the State Personnel Board. “Employee” includes* ~~any~~
17 *a former employee who met the criteria of this subdivision during*
18 *his or her employment.*

19 (b) “Illegal order” means *a directive to violate or assist in*
20 *violating a federal, state, or local law, rule, or regulation, or an*
21 *order to work or cause others to work in conditions outside of*
22 *their line of duty that would unreasonably threaten the health or*
23 *safety of employees or the public.*

24 ~~(b)~~
25 (c) “Improper governmental activity” means ~~any~~ *an* activity by
26 a state agency or by an employee that is undertaken in the
27 performance of the employee’s duties, undertaken inside a state
28 office, or, if undertaken outside a state office by the employee,
29 directly relates to state government, whether or not that activity is
30 within the scope of his or her employment, and that (1) is in
31 violation of any state or federal law or regulation, including, but
32 not limited to, corruption, malfeasance, bribery, theft of
33 government property, fraudulent claims, fraud, coercion,
34 conversion, malicious prosecution, misuse of government property,
35 or willful omission to perform duty, or (2) is economically
36 wasteful, or involves gross misconduct, incompetency, or
37 inefficiency. For purposes of Sections 8547.4, 8547.5, 8547.10,
38 and 8547.11, “improper governmental activity” includes any

1 activity by the University of California or by an employee,
2 including an officer or faculty member, who otherwise meets the
3 criteria of this subdivision. *For purposes of Sections 8547.4,*
4 *8547.5, and 8547.13, “improper governmental activity” includes*
5 *any activity by the Supreme Court, a court of appeal, a superior*
6 *court, or the Administrative Office of the Courts, or by an employee*
7 *thereof, who otherwise meets the criteria of this subdivision.*

8 ~~(e)~~

9 (d) “Person” means—~~any~~ *an* individual, corporation, trust,
10 association, ~~any~~ *a* state or local government, or ~~any~~ *an* agency or
11 instrumentality of any of the foregoing.

12 ~~(d)~~

13 (e) “Protected disclosure” means—~~any~~ *a* good faith
14 communication, including ~~any~~ *a* communication based on, or when
15 carrying out, job duties, that discloses or demonstrates an intention
16 to disclose information that may evidence (1) an improper
17 governmental activity, or (2) ~~any~~ *a* condition that may significantly
18 threaten the health or safety of employees or the public if the
19 disclosure or intention to disclose was made for the purpose of
20 remedying that condition. Protected disclosure specifically includes
21 ~~any~~ *a* good faith communication to the Bureau of State Audits
22 alleging an improper governmental activity and any evidence
23 delivered to the Bureau of State Audits in support of the allegation.
24 “Protected disclosure” also includes, but is not limited to, *a*
25 *complaint made to the Commission on Judicial Performance.*

26 ~~(e) “Illegal order” means any directive to violate or assist in~~
27 ~~violating a federal, state, or local law, rule, or regulation or any~~
28 ~~order to work or cause others to work in conditions outside of their~~
29 ~~line of duty that would unreasonably threaten the health or safety~~
30 ~~of employees or the public.~~

31 (f) “State agency” is defined by Section 11000. “State agency”
32 includes the University of California for purposes of Sections
33 8547.5 to 8547.7, inclusive, and the California State University
34 for purposes of Sections 8547.3 to 8547.7, inclusive. *Sections*
35 *8547.3 to 8547.7, inclusive, shall apply to the Supreme Court, the*
36 *courts of appeal, the superior courts, and the Administrative Office*
37 *of the Courts in the same manner as they apply to a state agency.*

38 SEC. 2. Section 8547.13 is added to the Government Code, to
39 read:

40 8547.13. (a) As used in this section:

1 (1) “Agency” means the Supreme Court, the courts of appeal,
2 the superior courts, or the Administrative Office of the Courts.

3 (2) “Employee” means a person employed by the Supreme
4 Court, a court of appeal, a superior court, or the Administrative
5 Office of the Courts.

6 (b) An employee or applicant for employment who files a written
7 complaint with his or her supervisor, manager, or any other agency
8 officer designated for that purpose by the agency, alleging actual
9 or attempted acts of reprisal, retaliation, threats, coercion, or
10 similar improper acts prohibited by Section 8547.3, may also file
11 a copy of the written complaint with the State Personnel Board,
12 together with a sworn statement that the contents of the written
13 complaint are true, or are believed by the affiant to be true, under
14 penalty of perjury. The complaint shall be filed within 12 months
15 of the most recent act complained about.

16 (c) The State Personnel Board shall investigate any complaint
17 filed, in accordance with the procedures of this chapter, and make
18 a recommendation to the hiring entity of the agency of the employee
19 or applicant regarding whether retaliation resulted in an adverse
20 action regarding the employee and, if so, what steps should be
21 taken to remedy the situation.

22 (d) Except for justices and judges who are subject to the
23 jurisdiction of the Commission on Judicial Performance, a person
24 who intentionally engages in acts of reprisal, retaliation, threats,
25 coercion, or similar acts against an employee or applicant for
26 employment for having made a protected disclosure, is subject to
27 a fine not to exceed ten thousand dollars (\$10,000) and
28 imprisonment in a county jail for up to one year. An employee who
29 intentionally engages in that conduct also shall be subject to
30 discipline by the agency. This subdivision does not limit any other
31 sanction that may be applicable by law.

32 (e) In addition to all other penalties provided by law, except for
33 justices and judges who are subject to the jurisdiction of the
34 Commission on Judicial Performance, a person who intentionally
35 engages in acts of reprisal, retaliation, threats, coercion, or similar
36 acts against an employee or applicant for employment for having
37 made a protected disclosure shall be liable in an action for
38 damages brought against him or her by the injured party. Punitive
39 damages may be awarded by the court if the acts of the offending
40 party are proven to be malicious. If liability is established, the

1 *injured party also shall be entitled to reasonable attorney's fees*
2 *as provided by law. It is not a prerequisite for an action for*
3 *damages for the injured party to first file a complaint pursuant to*
4 *subdivision (b).*

5 *(f) This section is not intended to prevent a manager or*
6 *supervisor from taking, directing others to take, recommending,*
7 *or approving any personnel action, or from taking or failing to*
8 *take a personnel action with respect to an employee or applicant*
9 *for employment, if the manager or supervisor reasonably believes*
10 *any action or inaction is justified on the basis of evidence separate*
11 *and apart from the fact that the person has made a protected*
12 *disclosure.*

13 *(g) In a civil action or administrative proceeding, once it has*
14 *been demonstrated by a preponderance of the evidence that an*
15 *activity protected by this article was a contributing factor in the*
16 *alleged retaliation against a former, current, or prospective*
17 *employee, the burden of proof shall be on the supervisor, manager,*
18 *or appointing power to demonstrate by clear and convincing*
19 *evidence that the alleged action would have occurred for*
20 *legitimate, independent reasons even if the employee had not*
21 *engaged in protected disclosures or refused an illegal order. If*
22 *the supervisor, manager, or appointing power fails to meet this*
23 *burden of proof against the employee in an administrative review,*
24 *challenge, or adjudication in which retaliation has been*
25 *demonstrated to be a contributing factor, the employee shall have*
26 *a complete affirmative defense on the issue of retaliation.*

27 *(h) Nothing in this article shall be deemed to diminish the rights,*
28 *privileges, or remedies of an employee under any other federal or*
29 *state law or under any employment contract or collective*
30 *bargaining agreement.*

31 *(i) An employee shall not directly or indirectly use or attempt*
32 *to use the official authority or influence of the employee for the*
33 *purpose of intimidating, threatening, coercing, commanding, or*
34 *attempting to intimidate, threaten, coerce, or command a person*
35 *for the purpose of interfering with the right of that person to*
36 *disclose to an agency official, designated for that purpose by the*
37 *agency, or the State Auditor matters within the scope of this article.*
38 *For the purpose of this subdivision, "use of official authority or*
39 *influence" includes all of the following:*

40 *(1) Promising to confer, or conferring, any benefit.*

1 (2) *Effecting, or threatening to effect, any reprisal.*

2 (3) *Taking or directing others to take, or recommending,*
3 *processing, or approving, any personnel action, including, but not*
4 *limited to, appointment, promotion, transfer, assignment,*
5 *performance evaluation, suspension, or other disciplinary action.*

6 (j) *An employee who violates subdivision (i) is subject to an*
7 *action for civil damages brought against the employee by the*
8 *injured party.*

9 (k) *Nothing in this section shall be construed to authorize an*
10 *individual to disclose any information, the disclosure of which is*
11 *otherwise prohibited by law.*

12 SEC. 3. *No reimbursement is required by this act pursuant to*
13 *Section 6 of Article XIII B of the California Constitution because*
14 *the only costs that may be incurred by a local agency or school*
15 *district will be incurred because this act creates a new crime or*
16 *infraction, eliminates a crime or infraction, or changes the penalty*
17 *for a crime or infraction, within the meaning of Section 17556 of*
18 *the Government Code, or changes the definition of a crime within*
19 *the meaning of Section 6 of Article XIII B of the California*
20 *Constitution.*

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27 ~~Section 11000, including, for purposes of Sections 8547.3 to~~
28 ~~8547.7, inclusive, an employee of the California State University,~~
29 ~~or an individual appointed by the Legislature to a state board or~~
30 ~~commission and who is not a Member or employee of the~~
31 ~~Legislature. In addition, "employee" means a person employed by~~
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33 ~~8547.3 to 8547.8, inclusive. "Employee" includes a former~~
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39 ~~line of duty that would unreasonably threaten the health or safety~~
40 ~~of employees or the public.~~

(c) ~~“Improper governmental activity” means an activity by a state agency or by an employee that is undertaken in the performance of the employee’s duties, undertaken inside a state office, or, if undertaken outside a state office by the employee, directly relates to state government, whether or not that activity is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct, incompetency, or inefficiency. For purposes of Sections 8547.4, 8547.5, 8547.10, and 8547.11, “improper governmental activity” includes any activity by the University of California or by an employee, including an officer or faculty member, who otherwise meets the criteria of this subdivision. For purposes of Sections 8547.4, 8547.5, and 8547.8, “improper governmental activity” includes any activity by the Administrative Office of the Courts, or by an employee thereof, that otherwise meets the criteria of this subdivision.~~

(d) ~~“Person” means an individual, corporation, trust, association, any state or local government, or an agency or instrumentality of any of the foregoing.~~

(e) ~~“Protected disclosure” means a good faith communication, including a communication based on, or when carrying out, job duties, that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity, or (2) a condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition. Protected disclosure specifically includes a good faith communication to the Bureau of State Audits alleging an improper governmental activity and any evidence delivered to the Bureau of State Audits in support of the allegation.~~

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